Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

MATTHEW S. ENGLISH,

Petitioner,

v.

SHERRY BURT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the last reasoned state court judgment reaches and rejects the merits of Petitioner's federal constitutional claim and declines to invoke a procedural bar, and where state prosecutors take no position on procedural default and file no briefs of any kind in the state court proceedings, whether an ambiguous form order by the state supreme court can properly be interpreted by a federal court as having invoked a procedural bar to federal review?

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Petitioner Matthew English respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 6, 2004.

OPINIONS BELOW

The district court's opinion and order (per Cleland, D.J.) granting Respondent's motion for summary disposition and dismissing Petitioner's petition for writ of habeas corpus was entered on May 17, 2004. It is appended (Pet. App. 6a-13a) and is not otherwise published. The district court's opinion and order denying Petitioner's motion for issuance of a certificate of appealability was entered on June 30, 2004. It is appended (Pet. App. 2a-5a) and is not otherwise published. The Sixth Circuit order denying Petitioner's petition for certificate of appealability was entered on December 6, 2004. It is appended (Pet. App. 1a) and is not otherwise published.

STATEMENT OF JURISDICTION

The Sixth Circuit entered the opinion and order which is the subject of this petition on December 6, 2004. The district court had jurisdiction pursuant to 28 U.S.C. § 2254. The Sixth Circuit had jurisdiction pursuant to 28 U.S.C. § 2253. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Provisions of the Sixth Amendment to the United States Constitution and 28 U.S.C. § 2254 relevant to this petition are reprinted in the Appendix. (Pet. App. 20a-21a).

STATEMENT OF THE CASE

On April 12, 2000, Petitioner Matthew English was involved in a fatal automobile accident. He was unable to recall how the accident occurred. On December 27, 2000, in St. Clair County Circuit Court, Mr. English was convicted by his plea of nolo contendere of two counts of vehicular manslaughter and one count of felonious driving. On May 29, 2001, the trial judge sentenced Mr. English to five (5) years probation, with the first year in custody, including house arrest, "boot camp" and other conditions. On June 19, 2001, Mr. English filed a claim of appeal to the Michigan Court of Appeals. Prior to the date scheduled for filing Mr. English's brief on appeal, on July 19, 2001, the Court of Appeals dismissed the appeal, citing the Michigan procedural rule that a plea-based conviction "is not appealable as a matter of right." MCR 7.203(A)(1)(b).

On July 25, 2001, Mr. English pled guilty to violating conditions of his probation. On August 7, 2001, the trial judge discharged Mr. English from probation as a violator without improvement and sentenced him to a prison term of seventy-two (72) to one hundred eighty (180) months, with credit for time served totalling one hundred sixty-nine (169) days.

On August 8, 2002, Mr. English moved in St. Clair County Circuit Court for relief from judgment pursuant to MCR 6.500, *et seq.*, alleging a violation of his federal constitutional right to the effective assistance of counsel in connection with his lawyer's performance at the trial court level. In his motion, Mr. English claimed actual innocence and that his lawyer had failed to conduct an adequate investigation into the cause of the crash. Mr. English's motion was supported by detailed affidavits and thoroughly

documented reports from accident reconstructionists demonstrating that the victim's vehicle, rather than Mr. English's, had caused the automobile accident. Significantly, the defense experts' findings were consistent with the initial police investigation which suggested that it had been the victim's car which had crossed the center line of the road, causing the accident.

On August 22, 2002, the trial judge reached the merits of, and denied, Petitioner's ineffective assistance of counsel claim without conducting a hearing and without directing a response from the prosecution.

On October 10, 2002, the Michigan Court of Appeals denied Petitioner's application for leave to appeal without receiving a response from the prosecution. In fact, the court ruled before the date set for the filing of the defendant-appellant's brief on appeal. The application for leave to appeal raised the identical issue to that raised in the trial court motion for relief from judgment.

On March 31, 2003, the Michigan Supreme Court denied Petitioner's timely filed application for leave to appeal in a one-sentence form order. The application for leave to appeal raised the same federal constitutional issue that had been raised in the lower courts, and again, the prosecution filed no response to the application.

On September 5, 2003, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising the same federal constitutional claim. On May 17, 2004, the district court granted Respondent's motion for summary judgment, dismissing Petitioner's petition. The district court interpreted the Michigan Supreme Court's ruling as a finding

of procedural default — *i.e.*, that Petitioner had failed to raise the issue on direct appeal as required by state law — and found that that ruling constituted an independent and adequate basis for the denial of relief. On June 30, 2004, the district court denied Petitioner's motion for issuance of a certificate of appealability. On December 6, 2004, the Sixth Circuit denied Petitioner's motion for issuance of a certificate of appealability.

REASON FOR GRANTING THE PETITION

Where The Last Reasoned State Court Judgment Reaches And Rejects The Merits Of Petitioner's Federal Constitutional Claim And Declines To Invoke A Procedural Bar, And Where State Prosecutors Take No Position On Procedural Default And File No Briefs Of Any Kind In The State Court Proceedings, An Ambiguous Form Order By The State Supreme Court Cannot Properly Be Interpreted By A Federal Court As Having Invoked A Procedural Bar To Federal Review Of A Federal Constitutional Claim.

During the collateral state proceedings, the trial court reached the merits of Mr. English's federal ineffective assistance of counsel claim. That merits decision is the sole basis relied on by the trial court for its decision. (Pet. App. 16a-18a).[1] Given the subsequent procedural history in state

1. The trial court ruled that counsel was not ineffective for failing to conduct an investigation into the cause of the fatal accident because the prosecution was able to produce evidence at preliminary examination that Petitioner's vehicle crossed the center line thereby demonstrating that Petitioner was responsible for the accident. (Cont'd)

court, the trial court's merits consideration belies any claim of procedural default, particularly where, as here, the state prosecutor never asserted a procedural bar at any point during the collateral appeal.

"[A] federal claimant's procedural default precludes federal habeas review . . . only if the last state court rendering a judgment in the case rests its judgment on the procedural default." *Harris* v *Reed*, 489 U.S. 255, 262, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989). If the state court does not actually enforce the procedural rule in question, the "federal court implies no disrespect for the state by entertaining the claim." *County Court of Ulster County, N.Y.* v *Allen*, 442 U.S. 140, 154, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979).

In *Ylst* v *Nunnemaker*, 501 U.S. 797, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991), this Court directed that a presumption be applied in cases where an explicit merits decision in the trial court is followed by an unexplained order in the state appellate court:

> The question presented by the present case, therefore, is how federal courts in habeas proceedings are to determine whether an unexplained order (by which we mean an order whose text or accompanying opinion does not disclose the reason for the judgment) rests primarily on federal law. The question is not an easy one. In [*Coleman* v

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(Cont'd)

The trial court's ruling ignored substantial evidence that: (a) the initial police investigation suggested that it had been the victim's car which crossed the center line and caused the accident; and (b) two separate defense accident reconstructionists concurred in the findings of the initial police investigation.

> *Thompson*, 501 U.S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991)] itself, although the order was unexplained, the nature of the disposition . . . and surrounding circumstances (in particular the fact that the state had rested its argument entirely upon a procedural bar), indicated that the basis was procedural default. But such clues will not always, or even ordinarily, be available. Indeed, sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent.
>
> The problem we face arises, of course, because many formulary orders are not meant to convey *anything* as to the reason for the decision. Attributing a reason is therefore difficult and artificial. We think that the attribution necessary for federal habeas purposes can be facilitated, and sound results more often assured, by applying the following presumption: *where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment . . . rest upon the same ground. If an earlier opinion "fairly appear[s] to rest primarily on federal law," [Coleman, 111 S. Ct. 2559], we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment . . . in place.*

Ylst, 111 S. Ct. at 2594 (emphasis supplied). While the *Ylst* presumption is a rebuttable one, nothing in the procedural history of this case remotely rebuts the presumption here.

At no time during the state collateral proceedings in this case did the state prosecutor argue a procedural default. In fact, the state prosecutor never filed a brief at any point during the state collateral proceedings. Moreover, during the state collateral proceedings, neither the trial court, nor the court of appeals, nor the Michigan Supreme Court ever expressly invoked a procedural default. The trial court rejected the ineffective assistance of counsel claim on the basis that the prosecution's accident reconstructionist, presented at preliminary examination, had concluded that Mr. English was to blame for the accident. Consequently, the trial court reached the factual predicate of the ineffective assistance of counsel claim and rejected it on the merits.

Similarly, in the Michigan Court of Appeals, the court expressly indicated that it was rejecting the application for leave to appeal "for lack of merit on the grounds presented." (Pet. App. 15a). The court of appeals never invoked a procedural default, nor did the court even mention MCR 6.508(D)(3) at all.

Finally, the Michigan Supreme Court issued a one-sentence form order citing MCR 6.508(D) without further explanation.

This Court's decision in *Ylst* dictates that in this context, the Michigan Supreme Court's form order should not be construed as invoking a procedural default against Petitioner. Significantly, the Michigan Supreme Court did not cite any of the specific subsections to MCR 6.508(D). If, as Respondent argued below, the Supreme Court had found specifically that Michigan's procedural rules barred this collateral appeal, the Court necessarily would have cited to subsection (D)(3) of MCR 6.508. By citing only the most

general language of MCR 6.508(D), a majority of the Court's seven justices may only have been able to reach an agreement that Mr. English had simply failed to carry his threshold "burden of establishing entitlement to the relief requested".

In addition, there are numerous non-procedural default interpretations that can reasonably be assigned to the language used by the Michigan Supreme Court. The language used is consistent with a ruling considering, and rejecting, the ineffective assistance of counsel claim on the same basis as that adopted by the trial court — on the merits. Alternatively, one or more of the justices of the Michigan Supreme Court could have determined that Mr. English had failed to sustain his "burden of establishing entitlement to the relief requested" under MCR 6.508(D) because the claim raised in the application for leave to appeal failed to address an issue of "significant public interest", or an issue "of major significance to the state's jurisprudence", etc. — prerequisites to any review by that court. MCR 7.302(B)(2) and (3). The latter bases do not constitute grounds of procedural default.

The lower courts' rulings are flawed for additional reasons as well. First, even assuming arguendo that the Michigan Supreme Court had based its ruling on a true procedural default — *i.e.*, that this claim should have been raised in Mr. English's direct appeal or be forfeited under MCR 6.508(D)(3) — such a ruling would not foreclose federal review under 28 U.S.C. § 2254 because Mr. English was neither entitled to a direct appeal by right, Mich. Const. 1963, Art. 1, § 20, nor was he entitled to appointed counsel to pursue an appeal by leave, MCR 6.425(E)(2), critical facts entirely overlooked by the federal district court judge. Such a ruling by the Michigan Supreme Court would be an "unreasonable determination of the facts in light of the evidence presented . . ." 28 U.S.C. § 2254(d)(2).

Second, even if the Michigan courts had invoked a procedural bar, Petitioner would have easily met the "cause", "prejudice" and "actual innocence" exceptions to procedural default under MCR 6.508(D)(3)(a) and (b). The "cause" of Petitioner's failure to raise the claim during direct appeal was that he had no right to a direct appeal.[2] He was prejudiced by virtue of trial counsel's lack of adequate investigation of the facts of the case, which incompetence led to Mr. English's loss of his right to a trial by jury at which the outcome of his case would likely have been different. His "actual innocence" was established through the initial police investigation and the reports of the defense accident reconstructionists who found that Mr. English was not to blame for the accident. *See* note 4, *infra.*

Third, the Michigan courts erred in their factual analysis of the ineffective assistance of counsel claim. The trial court relied upon the fact that the prosecution had presented testimony at preliminary examination which tended to show that Petitioner was to blame for the accident. However, Petitioner had the right to contest that evidence with his own defense experts at trial, a right squandered by trial counsel's ineffectiveness. Counsel knew that Mr. English had no recollection of the accident, and he knew that the initial police investigation suggested that Mr. English did not cross the center line, yet counsel failed to conduct his own investigation with a qualified expert. The state trial judge's focus on whether or not *the prosecution* had presented inculpatory evidence at preliminary examination misses the

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2. As noted above, Petitioner's first appeal was rejected by the Michigan Court of Appeals prior to the time limit for the filing of the Defendant-Appellant's Brief on Appeal. As such, it apparently made no difference to the state appellate court whether or not Petitioner raised a federal constitutional claim.

point. The question is whether: (1) *defense counsel* investigated adequately; and (2) if defense counsel had conducted a reasonable investigation, expert defense evidence would have been available to refute the prosecution's claim that Petitioner's vehicle had caused the accident.

In the instant context, a federal reviewing court is not obliged to accord deference to the state courts' procedural or substantive rulings, nor does the traditional "presumption of correctness" apply. 28 U.S.C. § 2254(e)(1). In *(Terry) Williams* v *Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), a total of five justices joined in the pertinent section of Part II of the decision which holds that federal courts are not required under the AEDPA[3] to defer to state judges' interpretations of federal law. Writing for this block of five justices, Justice O'Connor observed that "it is significant that the word 'deference' does not appear in the text of the [AEDPA] itself".

> When federal judges exercise their federal- question jurisdiction under the "judicial Power" of Article III of the Constitution, it is "emphatically the province and duty" of those judges to "say what the law is". *Marbury* v *Madison*, 1 Cranch 137, 177, 2 LEd 60 (1803). At the core of this power is the federal courts' independent responsibility — ... independent from the separate authority of the several states — to interpret federal law. A construction of the AEDPA that would require the federal courts to cede this authority to the courts of the States would be

3. The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (1994 ed. Supp. III).

> inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution.

Id., 120 S. Ct. at 1505. These five justices also defined a state court "'decision' as a legal judgment rendered 'after consideration of *facts, and . . . law*' ". *Id.* 1509 (citations omitted, emphasis supplied). That is, when a federal reviewing court makes its independent determination regarding the issue of ineffective assistance of counsel, it need not defer to the state court's analysis or findings. Similarly, when a reviewing federal court decides whether the federal ineffective assistance claim survives the state's ban on the appeal (by right) of guilty pleas, it likewise need not defer to the state court's legal analysis or factual findings. Rather, a federal court retains the power to grant relief if it finds that the state court's decision was erroneous in a context where the error(s) was a violation of a petitioner's federal constitutional right to the effective assistance of counsel.

Consequently, if the Michigan Supreme Court's form order was based on a finding that: (1) the failure to raise the claim on direct review constitutes a procedural default of all claims, even federal constitutional claims; or (2) Michigan's procedural rule (barring appeals as of right to plea-based convictions) defeats federal jurisdiction — these findings are reviewable and reversible in federal court. The district court was simply wrong in concluding that the "independent and adequate state ground" doctrine applies in this context. Ultimately, both bases cited above rely on, or result from, the fact that Petitioner had no appeal of right following a nolo contendere plea. A state procedural rule eliminating a criminal defendant's appeal by right may be an "independent" basis for the state courts' decision: however, it is not an

"adequate" basis for rejecting a viable federal constitutional claim based upon the deprivation of the federal right to the effective assistance of counsel.

> [E]ven where a state court decision is based entirely on an independent state procedural ground, that ground must be a constitutionally "adequate" one.

Skipper v *French*, 130 F.3d 603 (4th Cir. 1997), *quoting James* v *Kentucky*, 466 US 341, 348-49, 104 S. Ct. 1830, 1835, 80 L. Ed. 2d 346 (1984). *See also Ford* v *Georgia*, 498 U.S. 411, 424, 111 S. Ct. 850, 857-58, 112 L. Ed. 2d 935 (1991) (applying constitutional adequacy requirement to reject state supreme court's ad hoc procedural bar of federal claim).[4]

The federal court of appeal's decision to deny a certificate of appealability also was clearly erroneous. Pursuant to 28 U.S.C. § 2253(c), a certificate of appealability is issued where "the applicant has made a substantial showing of the denial of a constitutional right". Where, as here, the lower court's ruling results in a dismissal of a petition on procedural grounds, Petitioner is required to demonstrate only that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and would also find debatable the district court's ruling on

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4. In fact, the Sixth Circuit has acknowledged this principle recently in *Deitz* v *Money*, __ F.3d __, 2004 WL 2849573 (6th Cir. (Ohio)), where it held that a state procedural rule which grants absolute discretion to a state appellate court as to whether to consider late appeals is not one that is "firmly established and regularly followed", and therefore is not "adequate" for purposes of the rule allowing an "adequate and independent state ground" to foreclose habeas review. *Id.* *5.

the procedural issue. *Slack* v *McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

The *Slack* standard is much less stringent than is the standard for success on the merits and does *not* require Petitioner to demonstrate either that he is likely to succeed on appeal or even that any reasonable judge would, after hearing the appeal, rule in his favor. As this Court stressed in *Miller-El* v *Cockrel*, 537 U.S. 322, 338, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003):

> A prisoner seeking a COA must prove "'something more than the absence of frivolity' " or the existence of mere "good faith" on his part . . . *We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in Slack, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."* 529 US at 484, 120 S Ct 1595.

(Emphasis added).

Based upon all of the foregoing, in the instant case, at the very least, "reasonable jurists would find the district court's assessment of the constitutional claims debatable" and would also find the district court's assessment of the procedural issue

debatable. First, Petitioner's contention that the Michigan Supreme Court's form-order ruling did not invoke a procedural default is well supported by this Court's holding in *Ylst*, and consequently, the issue is manifestly "debatable". Second, as noted above, Petitioner provided substantial documentary and affidavit support for his claim of actual innocence, which would operate as an exception to any theoretical procedural bar under Michigan's rules. MCR 6.508(D)(3). While the district court found that Petitioner failed to *"establish"* actual innocence, jurists of reason would find it debatable whether Petitioner is obligated at this stage to *"establish"* actual innocence rather than make a colorable claim of actual innocence. *Cf., e.g., Rust* v *Zant*, 17 F.3d 155, 160 (6th Cir. 1994). The district court has erroneously erected a new threshold for granting a certificate of appealability much higher than the threshold set out by Congress in 28 U.S.C. § 2253(c). Congress did not intend — and could not fairly have intended — a petitioner seeking review of a state court action to "*establish*" actual innocence as a threshold matter in order to litigate whether he to she is unconstitutionally incarcerated. Rather, it is sufficient that, on the basis of the substantial evidence Petitioner presented, jurists of reason would find it debatable whether any procedural default — if there were one — should be excused on the basis of the fundamental miscarriage of justice or actual innocence exceptions.[5]

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5. In denying Petitioner's motion for issuance of a certificate of appealability, the district court stated that Petitioner "presented only bare allegations that an investigation would have proved that he was not the driver of the car . . . he presents no evidence that he is actually innocent." Order at p. 3. This statement is demonstrably incorrect. In support of his petition, Petitioner appended substantial evidence of actual innocence — the detailed reports of two accident reconstruction experts, each of whom supports with specificity Petitioner's theory of how the accident occurred. One report is three pages long and the other report is twelve

(Cont'd)

Consequently, the district court and the court of appeals should have granted the petition for certificate of appealability so that these issues could have been briefed and considered fully.

CONCLUSION

Pursuant to United States Supreme Court Rule 10(a), certiorari should be granted because the court of appeals' decision in this case is at odds with this Court's authority on these issues; and, consequently, consideration by the Court is necessary to secure and maintain uniformity of decisions.

For the foregoing reasons, Petitioner Matthew English respectfully requests that certiorari be granted in this case.

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pages long. Both reports are supported by attached copies of photographs, and one report is further supported by three additional pages of diagrams. These materials document that Petitioner unquestionably presented far more than "bare allegations". Whether or not the district court would ultimately have agreed with the experts' conclusion had the court considered them substantively, it cannot be reasonably denied that these material represent substantial, detailed evidence of actual innocence.